Supreme Court, U.S.
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No. 91-1535

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN BASH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in declining to admit legal materials into evidence.

2. Whether the district court properly instructed the jury that petitioner's alleged good-faith belief in the lawfulness of his conduct would negate the element of willfulness under the criminal tax laws.

3. Whether petitioner was properly convicted on multiple counts of aiding, assisting, and advising the preparation of false tax returns in successive tax years.

4. Whether there was sufficient evidence that petitioner aided, assisted, and advised the preparation and presentation of the false tax returns involved in Counts 52 through 64.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1991. A petition for rehearing was denied on December 24, 1991. Pet. App. B. The petition for a writ of certiorari was filed on March 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 27, 1988, petitioner was charged in a 67-count indictment. Count 1 charged petitioner with conspiring to defraud the United States by taking and causing others to take improper charitable deductions and investment tax credits on individual income tax returns, in violation of 18 U.S.C. 371. Counts 2 through 64 charged petitioner with aiding, assisting, and advising the preparation and presentation of false individual income tax returns to the Internal Revenue Service, in violation of 26 U.S.C. 7206(2). Count 65 charged petitioner with subscribing to a false joint income tax return for the year 1981, in violation of 26 U.S.C. 7206(1). Counts 66 and 67 charged petitioner with failing to file timely income tax returns for the years 1982 and 1983, in violation of 26 U.S.C. 7203.

Following a jury trial, petitioner was convicted on Counts 1 through 65 and acquitted on Counts 66 and 67. He was sentenced to consecutive terms of imprisonment totaling 12 years on Counts 1 through 4. Imposition of sentence was suspended on Counts 5 through 65 in favor of a five-year term of probation to follow his prison term. In addition, the court imposed a fine of $50,000.

2. The evidence at trial established that petitioner and co-conspirator Thomas S. Benzing engaged in various schemes to defraud the United States. The case centered on two schemes, one involving a master recording lease and the other involving charitable church contributions.

In 1980, petitioner and Benzing set up the Tax Clinic, later incorporated as the Tax Clinic, Inc. (TCI), as a financial planning and tax consulting business. They ran a series of advertisements promis-

ing to cut clients' taxes in half. GX 3-5. Holding themselves out as "archbishops" of the "Church of God," which they established, petitioner and Benzing held seminars at which they alternated in presenting information about opportunities designed to lower or eliminate the clients' tax liability. Gov't C.A. Br. 3-4.

TCI clients were counseled that forming a church could substantially reduce their tax liability. After payment of the required fees, the client would be certified as a minister by petitioner and Benzing and would be provided with the necessary documents to form a "church." Clients were advised that they could donate up to 50% of their gross income to the church. GX 8-2. The cash "donations" would be deposited into a church bank account and used to pay the client's personal, nondeductible expenses such as rent, utility bills, and car payments. Petitioner counseled clients that they were not required to perform any religious or charitable activities before charitable deductions could be taken. Gov't C.A. Br. 4-5.

Clients were also counseled to take as a charitable deduction the fee, which ranged from $625 to $2,000, that they paid to petitioner and Benzing's Church of God for assisting in establishing the client's own church. In addition, the clients were directed to pay a $25 monthly fee to the Church of God as an administrative fee to assist them if the legality of the client's church was ever questioned by the IRS. Petitioner also encouraged "donations" to his Church of God with the understanding that some of the money would be returned as "scholarships" or "loans" that would not have to be paid back. GXs 14-1, 14-11, 15-8 to 15-13; Gov't C.A. Br. 5-6, 8-9.

In 1981, petitioner and Benzing embarked on the second scheme charged in the indictment. They ad-

vised TCI clients to purchase a tax shelter from American Marketing Company (AMC), a partnership they controlled. GX 21-1. AMC was formed to sell leases of master recording tapes of children's educational recordings to investors. AMC ordered the title selected by an investor from International Educational Recordings (IER), a company formed by Joseph Gallo, who was solicited by petitioner and Benzing to produce the master recordings. Promotion and distribution were done by a third company, Troubadour Recording and Distributing Corporation (Troubadour). Petitioner and Benzing stated that although it would appear that all three companies were independent, everything would be controlled by TCI. Gov't C.A. Br. 20-21, 24. The master recordings were sold in 1981, 1982, and 1983. Most orders were made through TCI. Investors were advised by petitioner and Benzing that they could purchase a lease of a master recording for a period of eight years, receive an investment tax credit of 10% of the value of the master recording, and also deduct the cost of the lease. GXs 20-1, 20-2; Gov't C.A. Br. 21.

The evidence showed that petitioner's master recording leases did not produce legitimate investment tax credits. It took approximately six to eight weeks to complete a master recording after Gallo received an order from AMC, and no master recordings were in existence at the time a client made a purchase. Most orders for master recordings were made in December and did not satisfy the requirement that an asset be placed "in service" during a given tax year in order to qualify for an investment tax credit for that year. Gov't C.A. Br. 21, 26. In addition, the master recordings were assigned false valuations. For example, a ten-minute record, for which Gallo was paid $800, was valued at $125,000; a 15- or 16-

minute record, for which Gallo was paid $1,200, was valued at $200,000; and a long-playing album, for which Gallo received $2,300, was valued at $475,000. Gov't C.A. Br. 23-24.

Petitioner and Benzing did not make a serious effort to distribute the records. Initially, clients paid Troubadour, which was run by Lester Davis (another acquaintance of petitioner and Benzing), a $1,000 distribution fee. Davis told petitioner and Benzing that he could not assure adequate distribution for $1,000, but they told him they knew what they were doing, that he should make it look as good as possible, and that they would take care of the details. Davis could not begin to distribute records for clients received in 1981 until late in 1982 because he had to wait until Gallo produced the entire 1981 library in record form. During 1982, in accordance with a proposal by petitioner, Troubadour made a sham sale of records to a Cayman Islands company, and Davis informed clients that records from the 1981 program had been sold. Gov't C.A. Br. 24-26.

In addition to advising clients directly at their seminars, petitioner and Benzing referred clients to accountant Rick Henslee, whom they installed in the TCI offices during the 1981 tax season. Henslee prepared the 1980 tax returns of various individuals who claimed charitable contributions to their "churches" and an investment tax credit under the master recording tax shelter; he signed, as preparer, on at least 30 of the returns charged in Counts 2 through 64. Gov't C.A. Br. 7.

3. On appeal, petitioner argued that the district court erred in excluding certain exhibits from evidence and instructing the jury on his good-faith defense, and that the evidence was insufficient to sup-

port his convictions on Counts 2 through 64. The court of appeals rejected those contentions and affirmed petitioner's convictions.

The court noted that although petitioner did refer to excluded treatises and brochures containing certain cases, he did not testify that he relied on specific portions of those materials in forming his alleged good-faith belief in the legality of his activities. Pet. App. A7-A9. In the absence of such testimony, the court held, the legal materials were properly excluded. The court pointed out that Fed. R. Evid. 403 barred the admission of "amorphous background information which threatens to mislead the jury and cause confusion and delay." Pet. App. A8. The court also held that the jury instruction on good faith "was plainly sufficient and adequately covered the issue." *Id.* at A10. Finally, the court found the evidence sufficient to sustain the verdict on all counts. *Id.* at A10-A11.

In its order denying rehearing, the panel "particularly" noted that the record did not support petitioner's contention that the district court "forbad or limited his testimony regarding the legal materials. Rather, the court expressed doubt as to whether an amorphous mass of legal material could be admitted as exhibits." Pet. App. B13-B14.

ARGUMENT

1. Petitioner contends (Pet. 14-28) that the district court erred in excluding legal materials on which he claims to have relied (Pet. 15-18) and in declining to allow him to testify about the connection of those materials to his claimed belief in the legality of his actions (Pet. 18-19). These contentions are meritless.[1]

The courts of appeals have long held that a trial court has considerable discretion to exclude legal materials upon which a defendant supposedly relied because of their enormous potential to confuse the jury and because their alleged effect on a defendant's beliefs can be conveyed through his testimony. *United States* v. *Bergman*, 813 F.2d 1027, 1029-1030 (9th Cir.), cert. denied, 484 U.S. 852 (1987); *United States* v. *Malquist*, 791 F.2d 1399, 1402 (9th Cir.), cert. denied, 479 U.S. 954 (1986). See also *United States* v. *Mueller*, 778 F.2d 539, 540 (9th Cir. 1985) (characterizing defendant's claim that he should have been entitled to read legal materials to the jury as "frivolous"); *United States* v. *Mann*, 884 F.2d 532, 538 (10th Cir. 1989) (exclusion of cases and writings proper because they would confuse the jury about the law and because the defendant's testimony was more probative of his subjective beliefs than publications representing the source of those beliefs); *United*

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[1] Relying on *United States* v. *Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), cert. denied, 466 U.S. 980 (1984), petitioner also argues (Pet. 20) that the court's evidentiary rulings left the jury unable to consider the extent to which the law was uncertain. However, the court of appeals determined (Pet. App. A11) that the law was not uncertain, and petitioner has pointed to nothing suggesting that the court of appeals was incorrect in that regard.

States v. *Flitcraft*, 803 F.2d 184, 185-186 (5th Cir. 1986), cert. denied, 490 U.S. 1080 (1989); *United States* v. *Latham*, 754 F.2d 747, 751 (7th Cir. 1985); *United States* v. *Kraeger*, 711 F.2d 6, 7-8 (2d Cir. 1983); *United States* v. *Bernhardt*, 642 F.2d 251, 253 (8th Cir. 1981); *United States* v. *House*, 617 F. Supp. 232, 233 (W.D. Mich. 1985) (noting "enormous" potential for jury confusion), aff'd, 787 F.2d 593 (6th Cir. 1986).[2] It follows that a trial court may properly limit legal materials to the specific portions on which a defendant claims to have relied. Other portions plainly are irrelevant and inadmissible.

Here, as the court of appeals noted (Pet. App. A7-A9), petitioner never testified that he relied on specific parts of the excluded materials in deciding that his conduct was lawful. Hence, the evidence—"amorphous background materials which threaten[ed] to mislead the jury and cause confusion and delay" (*id.* at A8)—was properly excluded. See Fed. R. Evid. 403.

There is no merit to petitioner's assertion that *Cheek* v. *United States*, 111 S. Ct. 604 (1991), required admission of the excluded materials. Petitioner relies on an isolated passage in which the Court stated that "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." Pet. 26 (quoting 111 S. Ct. at 611). But nothing in *Cheek*, including the quoted passage, affects

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[2] See generally *Hamling* v. *United States*, 418 U.S. 87, 127 (1974) (a district court "retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative, and in requiring that which is to be brought to the jury's attention to be done so in a manner least likely to confuse that body"); Fed. R. Evid. 403.

the settled law regarding the admission of legal materials or suggests that irrelevant portions of such materials must be admitted. *Cheek* did not address those evidentiary issues. It instead involved the propriety of jury instructions on the substantive element of willfulness. The quoted passage concerning "evidence that might negate willfulness" related to those instructions, which required the jury to ignore the defendant's good-faith belief in the lawfulness of his conduct if that belief was not objectively reasonable. 111 S. Ct. at 608, 611. The holding of *Cheek* is merely that a defendant's good-faith belief negates willfulness, even if that belief is objectively unreasonable—"not that the trial judge must admit any and all evidence related to the basis of [that belief]." *United States* v. *Willie*, 941 F.2d 1384, 1395 (10th Cir. 1991), cert. denied, 112 S. Ct. 1200 (1992). Thus, *Cheek* did not alter existing law regarding the admissibility of legal materials. *Willie*, 941 F.2d at 1395.[3]

Nor is the decision below in conflict with *United States* v. *Harris*, 942 F.2d 1125 (7th Cir. 1991), as

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[3] See also *United States* v. *Malquist*, 791 F.2d at 1402 (correctly noting that good-faith belief is a "complete defense," while also upholding exclusion of legal materials upon which defendant supposedly relied); *United States* v. *Barnett*, 945 F.2d 1296, 1301 (5th Cir. 1991), cert. denied, 112 S. Ct. 1487 (1992) (post-*Cheek* case upholding exclusion of legal materials in accordance with prior circuit law and Fed. R. Evid. 403); *United States* v. *Fingado*, 934 F.2d 1163, 1165 n.1 (10th Cir.), cert. denied, 112 S. Ct. 320 (1991); *United States* v. *Hairston*, 819 F.2d 971, 973 (10th Cir. 1987) (court that excluded income tax literature upon which defendant ostensibly relied did "not prevent [defendant] from mounting a defense * * *, but rather exercised its discretion regarding the form in which such evidence should be admitted so as to minimize jury confusion").

petitioner contends (Pet. 27-28).[4] *Harris* did not involve the admissibility of legal materials, and it in no way suggests that a defendant must be allowed to introduce portions of such materials on which he does not specifically claim to have relied.[5]

Finally, contrary to petitioner's assertion (Pet. 18-19), he was not precluded from testifying about the substance of legal materials on which he claimed to have relied. See Tr. 1338-1339. Petitioner cites nothing in the record to support his assertion, and the court of appeals specifically found in its order denying rehearing that "the record does not support

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[4] Petitioner also asserts that the Ninth Circuit's ruling on this issus is inconsistent with its decision in *United States* v. *Powell*, 936 F.2d 1056 (1991), amended and superseded, 955 F.2d 1206 (1992). As petitioner concedes (Pet. 25), however, the *Powell* court found it unnecessary to reach this issue in its amended opinion; the alleged conflict with the original, superseded opinion is thus irrelevant. In any event, this Court ordinarily does not grant review to resolve an asserted intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[5] In *Harris*, the defendant was convicted of willfully failing to file tax returns and attempting to evade the income tax. The charges were based, in part, on her failure to report as income the value of jewelry she had received from a Mr. Kritzik, who was deceased at the time of trial. The defendant claimed the jewelry was a gift. The trial court excluded as hearsay letters written to the defendant by Kritzik. The Seventh Circuit held that the letters were not hearsay because they were not offered to prove the truth of any matters asserted therein. The court further found that the "critical nature" of the letters to Harris's defense precluded their exclusion under Fed. R. Evid. 403. 942 F.2d at 1130. The court pointed out that the letters could have caused Harris to believe that Kritzik loved her and intended the things he gave her to be gifts. Thus, in *Harris*, unlike in this case, the relevance of the excluded evidence was established.

[petitioner's] contention that the trial court forbad or limited his testimony regarding the legal materials." Pet. App. B13-B14.[6] Review of this factbound determination therefore is not warranted.

2. Petitioner also contends (Pet. 29-37) that the district court erred in declining to instruct the jury that it should consider his good-faith defense under a "subjective" standard. That objection is without merit.

In *Cheek*, the Court held only that it is error to instruct that a defendant's good-faith belief must be objectively reasonable to negate willfulness. The district court gave no such instruction here. It instructed (Tr. 1647 (Pet. 33-34)):

> Mr. Bash offered the defense of good-faith belief by Mr. Bash at the time involved of the lawfulness of the two programs which are the subject matter of this indictment, namely, that he believed in good faith that the charitable deduction church program described was lawful. He, also, believed in good faith that the investment tax credit, the master recording program offered, was lawful. If, in fact, you found that he did so believe, then that would be a defense. But I hasten to assure you that with respect to this issue of good-faith belief in the legality of the programs and good-faith reliance upon the advice of counsel, are spoken of as a defense but it

[6] Similarly, the court of appeals observed in its original opinion (Pet. App. A3 nn. 1, 2) that the district court allowed petitioner to testify about the two general tax treatises ("The Law of Tax Exempt Organizations" and "Nonprofit Corporations, Organizations and Associations") and the two cases (*Universal Life Church, Inc.* v. *United States*, 372 F. Supp. 770 (E.D. Cal. 1974), and *EMI North America Holdings, Inc.* v. *United States*, 675 F.2d 1068 (9th Cir. 1982)) that he cites.

> is not the burden of the defense to prove those issues. It is the burden of the government where the issue is raised to prove beyond a reasonable doubt that he did not have a good-faith belief in the programs * * *.

The court's use of the phrase "good-faith belief" made clear that the jury should apply a subjective standard, and its instruction neither stated nor implied the limitation, rejected in *Cheek*, that a good-faith belief must be objectively reasonable in order to negate willfulness. Rather, the jury was explicitly instructed that "[i]f, in fact, you found that he did so believe, then that would be a defense." Thus, the court properly directed the jury to focus its inquiry on petitioner's actual state of mind.[7]

3. Petitioner errs in contending (Pet. 37-43) that he was prosecuted for multiple felonies for the commission of a single act and that his convictions on Counts 3, 5, 55, 56, 58-62, and 64 therefore should be reversed. Petitioner was convicted on 63 counts of aiding, assisting, and advising the preparation and presentation of false individual income tax returns, in violation of 26 U.S.C. 7206(2). Counts 2 through

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[7] Petitioner asserts (Pet. 35-36) that the instruction violates the teaching of *Cheek* because the jurors were not specifically told to disregard their own personal feelings about the reasonableness of petitioner's claimed beliefs. But *Cheek* does not hold that a jury must be so instructed. Indeed, the Court recognized in *Cheek* that the reasonableness of a claimed belief is an appropriate consideration for the jury (111 S. Ct. at 611-612): "Of course, the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge."

51 were based on investment tax credits taxpayers claimed in relation to petitioner's master recording lease scheme; Counts 52 through 64 were based on charitable contributions taxpayers claimed in relation to petitioner's church scheme.

Contrary to petitioner's assertion (Pet. 37-38), he was not convicted of multiple felonies based on a "*single act* (participation in the formation of a church or participation in an entity that encouraged master recording lessees to take excessive investment tax credits)" that led to the filing of successive tax returns by individual taxpayers. Both schemes contemplated that each taxpayer involved would take unallowable deductions for more than one year. A separate offense was completed each time a taxpayer filed a false return based on the assistance or advice petitioner rendered, and petitioner was responsible for the filing of the false return as if he had filed it himself. *Habig* v. *United States*, 390 U.S. 222, 223 (1968); *Dennis* v. *United States*, 341 U.S. 494, 545 (1951) (Frankfurter, J., concurring); see also *United States* v. *Spudic*, 795 F.2d 1334, 1340 (7th Cir. 1986) (defendant convicted of both interstate transportation of a stolen motor vehicle and concealment of the same vehicle based on single act of changing the vehicle's identification number).

Furthermore, the record is replete with evidence that petitioner engaged in a continuing course of conduct and was extensively involved in the operations of both the church scheme and the master recording scheme. Gov't C.A. Br. 3-27. That course of conduct was designed to encourage taxpayers to file false returns for successive years.[8] Thus, it was not a single

[8] For example, petitioner recruited taxpayers and helped them to form their own "churches." He served as a minister

act, but numerous continuing acts that led to the multiple charges against petitioner.

Petitioner concedes that he can cite no authority in support of his novel argument, but urges the Court to consider, by analogy, *Mattingly* v. *United States*, 924 F.2d 785 (8th Cir. 1991). That case is of no help to petitioner. *Mattingly* construed 26 U.S.C. 6701(b)(3), which expressly limits the imposition of civil penalties for the promotion of abusive tax shelters. There is no similar limiting provision in 26 U.S.C. 7206(2).

4. Finally, petitioner argues (Pet. 43-47) that his actions leading to the formation of churches in 1980 were not sufficiently connected to the false tax returns filed for 1981 and subsequent years to support his convictions on Counts 52 through 64. That argument also has no merit.

Petitoner contends that there is no evidence that he discussed taxable income or deductions with anyone named in Counts 52 through 64 after 1980 and that the rapid development of tax law placed each taxpayer on notice that the availability of all deductions and exemptions should be reviewed by a competent tax advisor prior to filing a return. The government, however, was not required to prove that petitioner had personal contact with a taxpayer during a relevant tax year in order to establish a violation of Section 7206(2). It was sufficient for the government to introduce evidence from which the jury could infer that petitioner knew his scheme would result in the filing of false tax returns and deliberately proceeded

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of the mother Church of God, executed documents in that capacity to create new churches, and collected a $25 monthly fee from clients, which ostensibly ensured assistance if the validity of the church was challenged by the IRS.

with the scheme in the face of that knowledge. See, *e.g.*, *United States* v. *Gurary*, 860 F.2d 521, 524 (2d Cir. 1988), cert. denied, 490 U.S. 1035 (1989).

There was ample evidence that petitioner knew that his scheme would result in the filing of false returns for 1980 and subsequent years. He advised each client to set up his own franchise "church," to "donate" up to 50 percent of his gross income to that "church," to deposit the "donations" into a church bank account, and to use the account to pay personal nondeductible expenses. The clear implication of that advice was that the "church" would be used for tax avoidance over an extended period of time. Petitioner points to no evidence that clients were told that the advice pertained to only a single year.

Moreover, petitioner was responsible for post-1980 conduct that amounted to a reaffirmation of the legitimacy of the franchise "churches." During 1981, he delegated to co-conspirator James Brunner the collection of a $25 monthly fee to assist clients if the legality of their churches was ever questioned by the IRS. Petitioner also had Brunner contact "church" franchisees and conduct other activities to bring about more investments. Brunner testified that his activities for petitioner's "church" continued until February 1986. Gov't C.A. Br. 6, 10, 40.

Thus, both during and after 1980, petitioner engaged in, or was otherwise responsible for, conduct designed to encourage clients to claim false charitable deductions for 1980 and subsequent years. Accordingly, the evidence was sufficient to support his convictions on Counts 52 through 64.[9]

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[9] We note that petitioner's sentence would not be affected even if he prevailed on this claim, since he was sentenced to concurrent five-year terms of probation on Counts 5 through 65.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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